SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1964.

No. 424

OUTDOOR AMERICAN CORPORATION, G. & L. DISTRIBUTORS and GEORGE ROSENBLOOM,

Petitioners,

vs.

CITY OF PHILADELPHIA, HOWARD R. LEARY, JAMES C. CRUMLISH, JR., THE EVENING BULLETIN, TRIANGLE PUBLICATIONS, INC., and COLUMBIA BROADCASTING SYSTEM, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on June 30, 1964.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is unreported[1] and printed in the Appendix p. 11a, hereto, infra. The opinion of the United States Court of Appeals for the Third Circuit is unreported and is printed in the Appendix, infra, p. 21a.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on June 30, 1964. A hearing was denied on July 21, 1964. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254 (1).

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[1] See **Outdoor American Corp. v. City of Phila.**, No. 34316 (E. D. Pa. November 20, 1963, Legal Intelligencer, Dec. 6, 1963).

QUESTIONS PRESENTED.

1. Whether petitioners have the right under the First and Fourteenth Amendments to a hearing as to obscenity under a state obscenity statute before their publications can be confiscated by the police?

2. Whether Federal Courts should exercise their jurisdiction under the Civil Rights Act to protect that right?

STATUTES INVOLVED.

The statutory provisions involved are the Federal Civil Rights Statutes, Section 1343, (3) of Title 28, United States Code. This Act provides in material part:

> "The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * * * * * *
>
> "(3) To redress the deprivation, under color of any state law . . . . of any right, privilege or immunity secured by the Constitution of the United States."

The Constitutional provisions involved are the First and Fourteenth Amendments. The First Amendment reads as follows:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peacefully to assemble, and to petition the government for a redress of grievances."

The Fourteenth Amendment (Section 1.) reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE.

The Petitioners are publishers and distributors of nudist literature. Petitioner Outdoor American Corporation publishes nudist magazines and paperback books and ships them throughout the United States. Petitioner G. & L. Distributors is a partnership engaged in the wholesale distribution and sale of magazines and paperback books in Philadelphia and elsewhere. Petitioner George L. Rosenbloom is one of the owners and operators of G. & L. Distributors.

A Pennsylvania statute[1] makes it a felony to deal in ob-

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[1] Act of 1939, June 24, P. L. 874, Sec. 524 as amended, 18 Purdon's Stat. Ann., Sec. 4524:

Whoever sells, lends, distributes, exhibits, gives away or shows or offers to sell, lend, distribute, exhibit or give away or show, or has in his possession with intent to sell, lend, distribute or give away or to show, or knowingly advertises in any manner any obscene literature, book, magazine, pamphlet, newspaper, storypaper, writing, drawing, photograph, figure or image, or any written or printed matter of an obscene nature, or any article or instrument of an obscene nature, or whoever designs, copies, draws, photographs, prints, utters, publishes or in any manner manufactures or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, storypaper, paper, writing, figure, image, matter, article or thing, or whoever writes, prints, publishes or utters or causes to be printed, published or uttered, any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, of whom, or by what means any obscene book, picture, writing, paper, figure, image, matter, article or thing named in this section can be purchased, obtained or had, or whoever hires, employs, uses or permits any minor or child to do or assist in doing any act or thing mentioned in this section is guilty of a felony, and upon conviction, shall be sentenced to imprisonment not exceeding two (2) years, or to pay a fine not exceeding two thousand dollars ($2000), or both.

"Obscene," as used in this section, means that which, to the average person applying contemporary community standards, has as its dominant theme, taken as a whole, an appeal to prurient interest.

scene publications. The statute prescribes no procedure for the confiscation of allegedly obscene publications.

On October 1, 1963, Petitioner Rosenbloom was arrested for distributing obscene material. Without any search warrant the police searched his parked truck. After sifting through large numbers of magazines and paperback books, the police confiscated several hundred items.[2]

On October 3, 1963 and October 4, 1963, the police secured search and seizure warrants that gave them general authority to search for and seize material of an obscene nature.[3] The warrant did not describe petitioners' publications and contained no standards or other guides. The police searched Rosenbloom's home and a storage area not connected with his home. On this occasion the police confiscated duplicate copies of the publications taken three days earlier. These amounted to several thousand publications and constituted Petitioners' entire supply of these particular publications in the Philadelphia area.[4]

Seven months later, in May 1964, Petitioner Rosenbloom was found not guilty of the alleged obscenity charges and some of his publications were returned to him. The balance are still impounded for use as evidence against other defendants still under arrest.

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[2] At the same time twenty-two retail news dealers were also arrested as part of a city-wide raid. Allegedly obscene materials were confiscated from these sources as well. Some of Petitioners' materials are still retained by police for use as evidence in connection with the trials of some of these other persons.

[3] The warrants were secured on the basis of affidavits by police officers which stated and gave authority to seize, "paraphernalia pertaining to obscene literature," and "obscene books."

[4] Involved are nine magazines and two paperback books. The former and one of the paperbacks contained pictures of nude persons taken at nudist camps and articles about their activities and about the nudist movement. The other paperback book confiscated contained no pictures; it is a narrative history of the nudist movement.

After the seizure and confiscation Petitioners filed a civil complaint for relief under the Civil Rights Act, 42 U. S. C., Sec. 1983 and 28 U. S. C., Sec. 1343, in the United States District Court for the Eastern District of Pennsylvania. Petitioners' suit sought, among other things, an injunction against further police interference with their rights and for return of their publications. Petitioners contended that they had a constitutional right to a judicial determination of obscenity before their property could be seized by police.

Petitioners' suit was dismissed on defendants' motion. This was affirmed by the United States Court of Appeals for the Third Circuit, which also denied a petition for rehearing.[3]

As noted, the fundamental thrust of Petitioners' position before both Courts below was that it was in violation of their constitutional rights, as interpreted by the decisions of this Court, to confiscate their property prior to a judicial determination that their possession and distribution were violations of the Pennsylvania Obscenity Statute.

The Court of Appeals affirmed the District Court's action on the grounds, among others, that it could not interfere with the State Court's function of determining obscenity.

REASONS FOR GRANTING THE WRIT.

1. The judgment below is in direct conflict with decisions of this Court.

In *A Quantity of Copies of Books, et al. v. Kansas*, —— U. S. —— (June 22, 1964, 32 U. S. Law Week 4658) and

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[3] Petitioners' complaint named six defendants. Three of them were news media who were dropped upon Petitioners' appeal. The appeal was prosecuted only against the remaining three defendants.

Marcus v. Search Warrant, 367 U. S. 717 (1961), this Court held that it violated the First and Fourteenth Amendments to confiscate materials under an obscenity statute prior to a hearing and determination of obscenity.

In the latter case, the warrant gave the police virtually unlimited authority to seize any matter they considered obscene; the verified complaint which was the basis for the warrant did not include any specific description of the allegedly obscene item, and there was no prior submission to the judge who issued the warrant.

This Court said (361 U. S. at 153):

> "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech."

In the *Books* case, both by procedure prescribed by statute and by additional steps taken by the prosecuting authorities, the items to be confiscated were specifically described and were in part "scrutinized" by the judge who eventually issued the seizure order. Only those items were confiscated. Hearing on the merits was had some weeks later, after earlier denial of defendant's motion to dismiss the seizure on the same constitutional grounds urged here.

Despite the fact that the extra steps noted above were taken to avoid *Marcus*, this Court held that the absence of any hearing prior to seizure rendered the procedures "constitutionally deficient". Mr. Justice Brennan said (32 U. S. Law Week at 4659):

> "We hold that the procedures followed in issuing the warrant for the seizure of the books, and authorizing their impounding pending hearing were constitution-

ally insufficient because they did not adequately safeguard against the suppression of nonobscene books."

The practical importance of this rule is best illustrated where, as here, the material suppressed is subsequently determined to be nonobscene.

The facts in the present case are virtually identical to those in *Marcus*. The inevitable result of those facts is identical to what happened in both *Marcus* and *Books*: a confiscation of Petitioners' property on grounds of alleged obscenity, prior to any determination of obscenity. As held in the two cited cases, this violates Petitioners' constitutional rights under the First and Fourteenth Amendments.

The Court below therefore missed the mark in refusing to give relief, because to do so would "ambush the state courts by deciding the fundamental basis of obscenity" (—— F. 2d at ——, p. 24a of App.). Petitioners were not seeking any such decision or any other interference with the state court proceeding. Petitioners were entitled to and asked only for the return of their property and freedom from further harassment until the state court could make its own determination of obscenity in accordance with usual state court procedures.

The Circuit Court of Appeals said also: "If held obscene, plaintiff cannot complain of confiscation." This is directly in conflict with *Marcus* and *Books*. The exact teaching of those cases is that petitioners are not required to sit mute awaiting trial in the state criminal court while their property continues confiscated and their constitutional rights continue violated. Merely because there was a guarantee of a fair trial has nothing to do with their rights in the interim.

It appears that the court below placed concern for interference with state court proceedings over interest in petitioners' constitutional rights. As noted, there is no effort

here to by-pass the state court's jurisdiction to determine obscenity. Petitioners' complaint is rather the violation of their constitutional rights pending that determination. This is the proper function of the federal court and does not reach the merits of the question of obscenity which is left solely with the state courts. Nonetheless the Court of Appeals said:

> "No doubt defendants intend to enforce the Pennsylvania statute against plaintiffs' publications until final adjudication of their obscenity."

This is flatly in conflict with *Marcus* and *Books*.

The Court went on to explain that Petitioners had no basis for assuming that the state officials would not observe the final outcome of the criminal proceedings and that plaintiffs' inconvenience and loss "were no more than what is incidental to every criminal proceeding brought lawfully and in good faith."

This too misses the mark as to the very heart of the case. The very question involved is whether the proceeding was "brought lawfully". Petitioners contend that *Marcus* and *Books* hold it was not. As this court said in *Books*, the constitutional deficiencies were not cured by the subsequent "full hearing".[6] So here: observance by the state authorities of Petitioners' other rights does not correct the earlier confiscation which constituted an unconstitutional previous restraint and censorship. The error of the court below is demonstrated further by its reference in a footnote to *Grove Press, Inc. v. Calissi*, 208 F. Supp. 580 (N. J. 1962) and *Toth v. Gilbert*, 184 F. Supp. 163 (N. D. Ohio, 1960). Neither case dealt with the only question involved here.

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[6] See also **Monroe v. Pope**, 365 U. S. 167 (1961); **McNeese v. Board of Education**, 373 U. S. 668 (1963); **Cantwell v. State of Conn.**, 310 U. S. 296 (1940).

namely the constitutionality of the confiscation prior to an adversary determination of obscenity. Rather both cases involved a request that the Federal court intervene, suspend or otherwise deal with the actual criminal proceedings in the state court.

2. The question presented is of far-reaching importance in the administration of the Pennsylvania and other similar statutes and in the protection of the constitutional guarantee against suppression of freedom of speech and the press. In addition the rule enunciated in the judgment below can serve as a dangerous precedent in other areas involving the interpretation of the First and Fourteenth Amendments.[7]

Questions involving freedom of speech and prior restraint have been before this Court with comparative frequency. This is illustrated by the *Marcus* and *Books* cases and by the other cases cited in those opinions. It is further illustrated by the fact that the latter case involved four opinions by the justices of this Court. In these circumstances, it is of obvious importance that the judgment below be reviewed by this Court. This is especially true if, as Petitioners have noted above, the judgment below is in direct conflict with this Court's decisions in *Marcus* and *Books*.

The public interest in this case is further illustrated by the fact that the obscenity statute of at least one other state has been reviewed recently in the same context as applies here. In *Evergreen Review, Inc. v. William Cahn, District Attorney, County of Nassau, State of New York*, —— F.

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[7] In an opinion dated Aug. 12, 1964, the same District Court judge who heard the instant case cited the opinion of the Court below in support of his reluctance to "interfere". **Dale Book Co., Inc. v. Leary, et al.**, —— F. S. —— (E. D. Pa. 1964). That opinion quotes and relies upon the very language quoted in this petition as illustrating the conflict with **Marcus** and **Books.**

Supp. —— (E. D. N. Y. June 11, 1964, Docket No. 64-C-441), the court set aside as unconstitutional the same type of prior restraint as has been approved by the judgment below.

A three-judge court convened pursuant to the Federal Civil Rights Act dealt with the New York State Penal Law under which a warrant had issued for the confiscation and delivery to the Court of "indecent, obscene and pornographic magazines using the name 'Evergreen'". On the same day on which the search occurred the same judge examined an appropriate sample of the allegedly obscene items and authorized the issuance of an Information. Warrants of arrest were issued and the balance of the defendant's supplies were confiscated.

Citing *Marcus* the Court held that the procedure followed there constituted a "technique . . . . expressly condemned in *Marcus*" and an unconstitutional "means of wholesale suppression of allegedly obscene and pornographic material prior to any adversary proceeding or a judicial scrutiny or superintendence so necessary for the protection of non-obscene material." [8]

If the procedures followed here, which, petitioners contend, are expressly forbidden in both *Marcus* and *Books*, are allowed to stand, the effect of the judgment of the court below that petitioners must await the exhaustion of state remedies is to render ineffective petitioner's constitutional right to free speech and press. There would be nothing to prevent the reinstitution of these same illegal procedures again and again. Under the Civil Rights Statute the federal courts have the means through equitable power to insure the requirement of an adversary determination on the question of obscenity prior to mass seizure when a state does not act to grant the required relief. Refusal to exer-

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[8] The opinion is printed in appendix b attached to this petition.

cise that power results in violation of petitioners' constitutional rights and raises serious questions in the application of the Pennsylvania and similar statutes.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

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APPENDIX b.

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT OF NEW YORK.

EVERGREEN REVIEW, INC.,
Plaintiff,
against
WILLIAM CAHN, District Attorney, County of Nassau, State of New York,
Defendant.

64-C-441.
June 11, 1964.

OPINION.

Before: HAYS, Circuit Judge, and ROSLING and BARTELS, District Judges.

PER CURIAM.

The complaint in this action, brought under the Federal Civil Rights Law (42 U. S. C. §1983), attacks as unconstitutional the seizure by the District Attorney of Nassau County under Sections 1141 and 1144 of the New York State Penal Law, of approximately 21,000 copies of the

magazine "Evergreen Review" claimed to be obscene and pornographic. It seeks injunctive relief, damages and a declaratory judgment of unconstitutionality, and states that the action is to be tried and determined by a three-judge court pursuant to Sections 2281 and 2284, 28 U. S. C. Upon plaintiff's application the District Judge ordered defendant to show cause why he should not be directed to return the seized copies of plaintiff's magazine and be enjoined during the pendency of this action from interfering with the manufacture, distribution or sale thereof, and pending the determination of this application, temporarily restrained defendant from disposing of the copies of the magazine. During the argument before the three-judge court defendant filed a comprehensive motion to dismiss the complaint, dissolve the three-judge court and stay the proceedings until the outcome of certain criminal actions now pending in the State courts. The Attorney General of the State of New York also appeared and joined in defendant's motion. Subsequently, the defendant and the Attorney General filed briefs in support of this motion, which were duly considered.

Facts.

On April 24, 1964, Albert C. Anderson, a detective in the Nassau County Police Department assigned to the District Attorney's Squad, submitted an affidavit[1] to a Nassau

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[1] The text of the affidavit is as follows:

"I am a Detective in the Nassau County Police Department, assigned to the District Attorney's Squad.

That on April 24th, 1964, a confidential informant related the following information to me at the Office of the District Attorney of the County of Nassau, New York.

That my informant had been employed at the premises doing business as CORYDON M. JOHNSON CO., INC., which is located

County Judge predicated upon information furnished him by "a confidential informant" employed on the premises of Corydon M. Johnson Co., Inc., where the magazine "Evergreen Review" was being bound, to the effect that she had informed Anderson that while working in the bindery she

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on Route 107, Hicksville Road, Bethpage, County of Nassau, New York, and was working in the department for final preparation of binding for magazines. My informant further stated to me that a magazine using the name 'EVERGREEN' was being prepared for completion and that while working my informant observed black and white photographs in the magazine which showed nude human forms, possibly male and female, but reputed by fellow workers to be two females, and that the forms portrayed various poses and positions indicating sexual relations. My informant further stated having read portions of the printed material accompanying the aforesaid photographs and described the printed matter of consisting of four lettered obscene language.

In addition my information further stated to me of having seen such publications as PLAYBOY and similar magazines and stated there was no comparison between them. Further that one of the bosses of the premises made the statement, in the presence of my informant, that three thousand of the magazines were to be completed in one day.

My informant also stated that the aforesaid location has employed on a part time basis, students of high school age, who handle the magazine in question in connection with their work.

Based upon the foregoing reliable information there is probable cause to believe that obscene, indecent and pornographic magazines, using the name 'EVERGREEN' have been used or are possessed with intent to be used as the means of committing a crime, to wit: Violation of Section 1141 of the Penal Law of the State of New York and are being concealed within the premises doing business as CORYDON M. JOHNSON CO., INC., located at Route 107, Hicksville Road, Bethpage, County of Nassau, New York, occupied by JOHN DOE.

WHEREFORE, I respectfully request that the Court issue a Warrant and Order of Seizure, in the form annexed, authorizing the search of the premises doing business as CORYDON M. JOHNSON CO., INC., located at Route 107, Hicksville Road, Bethpage, County of Nassau, New York, and directing that if such property or evidence or any part thereof be found that it be seized and brought before the Court; together with such other and further relief that the Court may deem proper.

No previous application in this matter has been made in this or any other Court or to any other Judge, Justice or Magistrate."

observed black and white photographs in the magazine "Evergreen Review" "which showed nude human forms, possibly male and female, but reputed by fellow workers to be two females, and that the forms portrayed various poses and positions indicating sexual relations", and that the printed material accompanying the photographs consisted of four lettered obscene language. "Based upon the foregoing reliable information," Anderson concludes, "there is probable cause to believe that obscene, indecent and pornographic magazines" are being used or possessed with intent to be used for the purpose of committing a crime in violation of Section 1141 of the Penal Law. Upon this affidavit the County Judge issued a warrant pursuant to Section 1144 of the Penal Law[2] that there was "probable cause for believing that certain property has been used or is possessed with intent to be used as the means of committing a crime, to wit: Violation of Section 1141 of the Penal Law of the State of New York," authorizing a search of the bindery and a seizure of such property which "may have been delivered for indecent, obscene and pornographic magazines using the name 'Evergreen' " and to bring such property before the court. Pursuant thereto, seizure of approximately 21,000 copies of the magazine was made on the

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[2] Section 1144 provides in part that

"A magistrate having jurisdiction to issue warrants in criminal cases, upon complaint that any person within his jurisdiction is offending against the provisions of this article, supported by oath or affirmation, must issue a warrant, directed to the sheriff or to any constable, marshal, or police officer within the county, directing him to search for, seize, and take possession of any of the articles specified in this article, in the possession of the person against whom complaint is made. The magistrate must immediately transmit every article seized by virtue of the warrant, to the district attorney of the county, who must, upon the conviction of the person from whose possession the same was taken, cause it to be destroyed, and the fact of such destruction to be entered upon the records of the court in which the conviction is had."

same day by three County detectives. According to the affidavit of the managing editor, said 21,000 copies together with 4,000 copies previously mailed to subscribers, comprised the entire print run of the April-May 1964 issue.

After the seizure and the initiation of this action, Anderson in a subsequent affidavit, sworn to May 16, 1964 and filed in support of the defendant's motion, stated that after reading his affidavit the County Judge questioned him "with respect to the source and nature of my information" and then decided the affidavit was sufficient for a search warrant. He further explains therein how the seizure occurred and states that on April 24th he proceeded to the bindery with two other detectives and a search warrant and then seized two copies of the magazine and returned to the District Attorney's office with said copies but leaving the other detectives on the premises of the bindery. He adds that the District Attorney then read the magazine[3] and ordered Anderson to draw up an information alleging violation of Section 1141 of the Penal Law and to present the same to a District Judge; that upon such presentation the same Nassau County Judge on the same day read the magazine and decided that it was pornographic and thereupon authorized the information against the plaintiff, its officers, Barney Rosset and Richard Seaver, and against Pegasus Press, Inc., the company printing the magazine, and its president, George Haralampoudis, and that warrants of arrest (not of seizure) were then issued by another judge against the alleged offenders. Upon execution of the arrest warrants, copies of the magazine were loaded upon vehicles and delivered to the Property Clerk of the Police Department.

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[3] A search warrant gains no support from investigations and observations after it is signed. **Tripodi v. Morgenthau,** S. D. N. Y. 1962, 213 F. Supp. 735; **United States v. Sims,** M. D. Tenn. 1962, 201 F. Supp. 405.

Anderson's affidavit of April 28th, filed before this action, states that upon execution of the April 24th warrant "Approximately Twenty One Thousand (21,000) bound and unbound copies of magazines known by the name 'EVERGREEN'" were seized "under and pursuant to the warrant". Criminal actions are now pending in the District Court of Nassau County against Gearge Haralampoudis and Pegasus Press, Inc.

In support of the defendant's motion to dismiss and for other relief, Henry P. Devine, Chief of the Law and Appeals Department of the Nassau County District Attorney's office, filed an affidavit, sworn to May 15, 1964, stating that he had read Anderson's affidavit of May 15th[4] and that "The procedure he [Anderson] describes was the procedure used by the District Attorney's office of the County of Nassau in this case" and "conforms, generally, to the practice of the District Attorney's office when complaints are received by the members of the District Attorney's staff, or by members of the Police Department where notice is given to the District Attorney's office."

The issues before this Court are (1) whether plaintiff's demand for an injunction to restrain the enforcement by the defendant of Sections 1141 and 1144 of the New York Penal Law by seizure of 21,000 copies of plaintiff's magazine, falls within the jurisdiction of a three-judge court as provided by Section 2281 of Title 28 of the United States Code and (2) if so, whether such application of said sections based upon a judge's warrant prior to the determination of the issue of obscenity, violates plaintiff's constitutional rights under the First, Fourth and Fourteenth Amendments.

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[4] Anderson's affidavit is sworn to May 16, 1964, which is a little confusing in the light of Devine's affidavit sworn to May 15th, stating that Devine had read Anderson's affidavit of May 15th.

I.

The threshold question to be decided is whether the three-judge court was properly invoked. Since Section 2281 procedure dislocates the normal operations of the Federal courts, the statute must be strictly construed according to its terms. It is not to be invoked to restrain the lawless exercise of authority by a state official in a unique or particular case, *Phillips v. United States*, 1941, 312 U. S. 246; *Penagaricano v. Allen Corporation*, 1 Cir. 1959, 267 F. 2d 550; nor when the controversy involves merely the construction of a state law, see *Kesler v. Department of Public Safety, etc.*, 1962, 369 U. S. 153; nor when the constitutional question is no longer open, *Bailey v. Patterson*, 1962, 369 U. S. 31. As remarked in *Ex parte Bransford*, 1940, 310 U. S. 354, it is necessary to distinguish between a petition which seeks an injunction on the ground of unconstitutionality of the result obtained by use of a statute not attacked as unconstitutional and a petition for an injunction on the ground of unconstitutionality of a statute as *applied*. Only the latter requires a three-judge court. Accordingly, if the complaint alleges a basis for equitable relief based upon unconstitutionality of a statute as applied, a single judge may not grant or withhold relief but must invoke the statutory court. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 1962, 370 U. S. 713. These criteria have certainly been satisfied here and the three-judge court was properly invoked.

II.

In the interest of clarity, it should be stated that the plaintiff does not, in effect, assail the legislation insofar as it outlaws obscene and pornographic material and this issue is really not before this Court. In fact, the statute on its

face is not unconstitutional. The attack in this case is against the power of New York State to adopt a scheme of enforcing the prohibitions of Section 1141 by the methods set forth in Section 1144 as applied by the District Attorney.

The protection of freedom of press and speech provided by the First Amendment has by many classic decisions of the Supreme Court been made applicable to the States by the due process clause of the Fourteenth Amendment. See *Near v. State of Minnesota ex rel. Olsen*, 1931, 283 U. S. 697; *Smith v. People of the State of California*, 1959, 361 U. S. 147, *rehearing denied*, 1960, 361 U. S. 950. In a similar manner the search and seizure prohibition of the Fourth Amendment has been applied to the States. *Mapp v. Ohio*, 1961, 367 U. S. 643, *rehearing denied*, 1961, 368 U. S. 871. Freedom of press and speech is jealously guarded and "The door barring federal and state intrusion into this area cannot be left ajar". *Roth v. United States*, 1957, 354 U. S. 476, at 488. The cases recognize that this freedom, however, is not absolute. For instance, obscenity "is not within the area of constitutionally protected speech or press." *Roth v. United States*, supra, p. 485; *Alberts v. State of California*, 1957, 354 U. S. 476; *Near v. State of Minnesota ex rel. Olsen*, supra, and the publication of such material may be regulated by the States. In enforcing such regulations, the State is not limited "in resorting to various weapons in the armory of the law." *Kingsley Books v. Brown*, 1957, 354 U. S. 436, 441.[5] But such regulations must provide safeguards to prevent the denial of freedom of speech and press since no State has the power to restrict the dissemination of non-obscene publications. *Smith v. People of the State of California*, supra.

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[5] Narrowly upholding §22-a of the Code of Criminal Procedure supplementing the existing criminal provisions by authorizing limited injunctive remedies under closely defined procedural safeguards.

Very much in point is *Marcus v. Search Warrants of Property, etc.*, 1961, 367 U. S. 717, where a number of books and publications allegedly obscene, were seized pursuant to warrants issued to peace officers under a Missouri statute by a magistrate upon a sworn complaint that obscene material was kept in certain places and commanding the officers to bring such material before the magistrate. The proceeding was *ex parte*, as here, and although the obscene material was not identified, a hearing was required to be held within twenty days for the purpose of determining whether the material was obscene. Holding that such mass seizure without any safeguards to protect legitimate expression was in violation of the Fourteenth Amendment which infected the entire proceeding, the court said:

> "* * * The separation of legitimate from illegitimate speech calls for * * * sensitive tools * * *.' Speiser v. Randall, 357 U. S. 513, 525, 78 S. Ct. 1332, 1342, 2 L. Ed. 2d 1460. It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech" (p. 731).

and again

> "Kingsley Books does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene" (pp. 735-736).

In *Bantam Books, Inc. v. Sullivan*, 1963, 372 U. S. 58, the Rhode Island Commission to Encourage Morality in Youth with power to recommend prosecutions, listed certain

publications as objectionable and notified distributors of its adverse findings. The court held that this constituted suppression of the listed publications in violation of the Fourteenth Amendment, remarking that:

> "There is no provision whatever for judicial superintendence before notices issue or even for judicial review of the Commission's determinations of objectionableness. The publisher or distributor is not even entitled to notice and hearing before his publications are listed by the Commission as objectionable" (p. 71).

and that:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" (p. 70).

The New York State courts have held that even a proceeding under 22-a of the Code of Criminal Procedure, which, in effect, is a civil proceeding addressed to the publication itself, does not permit extensive restraints prior to judicial scrutiny on the issue of obscenity, and that where such prior seizure has been made the proceeding is infected with an unconstitutional taint. *Stengel v. Smith*, 4th Dep't 1963, 18 A. D. 2d 458, 240 N. Y. S. 2d 200. Similarly, such a proceeding does not authorize an *ex parte* injunction. *Tenney v. Liberty News Distributors, Inc.*, 1st Dep't 1961, 13 A. D. 2d 770, 215 N. Y. S. 2d 663. It would be illogical and inconsistent to suppose that prior restraints upon distribution of publications would be unconstitutionally tainted under a 22-a civil proceeding, yet be free from such taint under a 1144 conventional criminal proceeding. Section 1144 is a search and seizure section providing for seizure of not only objectionable material but also of equipment producing and vehicles transporting such material[6] and applies to

[6] Section 1141-c of the New York Penal Law.

seizures subsequent, as well as prior, to conviction. Warrants involving seizure of equipment or gambling paraphernalia, or the like, are not in the same category as warrants involving the seizure of publications subject to the protection of the First Amendment. The issuance of the latter warrants raises the question not only of the possession and use of objectionable material but also of the application of proper standards to determine that probable cause exists that such material is objectionable. *Cf., Smith v. People of the State of California*, supra, and *Marcus v. Search Warrants of Property, etc.*, supra, p. 731.

Here no adversary proceeding or judicial scrutiny or superintendence of any kind was required before the issuance of the warrant. In fact, Section 1144 permits a warrant to be issued by a magistrate "upon complaint that any person within his jurisdiction is offending against the provisions of this article, supported by oath or affirmation * * *". Apparently the complainant determines whether or not the publication is obscene. Pursuant to this authority Anderson filed his complaint but he never saw a copy of the magazine and none was attached to the affidavit. Moreover, his complaint was not based upon his own information but it was based upon hearsay information of a woman worker who had read only portions of the magazine and who in one instance relied upon what was "reputed by fellow workers to be two females". This technique is the procedure that is generally followed by the District Attorney's office in Nassau County according to the affidavit of Henry P. Devine. A warrant based upon such a procedure leaves to the officer executing the warrant the determination of what is obscene, which technique was expressly condemned in *Marcus*. The Court finds that the State in applying Section 1144 in the manner above described, has used the power of search and seizure as a means of wholesale suppression of allegedly obscene and pornographic material

prior to any adversary proceeding or a judicial scrutiny or superintendence so necessary for the protection of non-obscene material. Such application is a clear violation of the Fourteenth Amendment.

The defendant has urged that this Court abstain from taking jurisdiction of the case because the plaintiff has adequate remedies in the State court and accordingly contends that the proceeding should be stayed pending the determination of the criminal proceedings now before the State court. There is no merit to this contention. That the State law affords judicial remedies subsequent to seizure, would not save the statute. Such a proceeding was available and pending under the Missouri statute challenged in *Marcus*. "Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible." *Cantwell v. State of Connecticut*, 1940, 310 U. S. 296, 306; see also *McNeese v. Board of Education for Community Unit School District 187*, 373 U. S. 668; *Monroe v. Pape*, 1961, 365 U. S. 167.

III.

As to the remedy, this Court will abstain from enjoining the prosecution of the criminal actions pending in the State courts and from granting plaintiff's request for declaration that Penal Law, §1141 may not be constitutionally applied to this publication. The latter question is not before this Court and remains to be determined. However, the seizure of plaintiff's publication on April 24th under Section 1144 as applied, being a violation of the Fourteenth Amendment, which infected the entire proceeding, the plaintiff is entitled to an order (1) requiring the defendant to return all copies of the seized publication and (2) enjoining the defendant

from any future interference with the distribution of the No. 32 issue of the Evergreen Review prior to a judicial determination of its obscenity. See *In re Louisiana News Company*, E. D. La. 1960, 187 F. Supp. 241; *Stengel v. Smith*, supra. The remaining claims set forth in the complaint and in 1(b) of defendant's motion to dismiss the complaint are hereby remanded to Judge Rosling for determination. See 3 Moore, Federal Practice §18.07[2].

Settle order on two days' notice.

PAUL R. HAYS,
United States Circuit Judge.
J. R. BARTELS,
United States District Judge.
GEORGE ROSLING,
United States District Judge.

Office Supreme Court, U.S.
FILED
AUG 22 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964.

No. 424

OUTDOOR AMERICAN CORPORATION, G. & L. DISTRIBUTORS and GEORGE ROSENBLOOM,

Petitioners,

vs.

CITY OF PHILADELPHIA, HOWARD R. LEARY, JAMES C. CRUMLISH, JR., THE EVENING BULLETIN, TRIANGLE PUBLICATIONS, INC., and COLUMBIA BROADCASTING SYSTEM, INC.,

Respondents.

Appendix

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Appendix

RELEVANT DOCKET ENTRIES.

1963

Oct. 14. Complaint filed.

Oct. 14. Summons exit.

Oct. 15. Order denying Temporary Restraining Order and fixing hearing for Preliminary Injunction on Oct. 21, 1963 at 9:30 A. M. in Court Room 2 and affidavits filed.

Oct. 21. Argued sur defendants' motions to dismiss complaint.

Oct. 21. Motion of City of Phila., H. R. Leary and J. C. Crumlish to dismiss filed.

Oct. 22. Transcript of arguments re petition preliminary injunction 10/21/63 filed.

Nov. 20. Opinion (Hon. John W. Lord, Jr.) and Order of Court granting motions to dismiss of defendants, City of Philadelphia, Howard R. Leary and James C. Crumlish, Jr., and dismissing the complaint of plaintiffs, Outdoor American Corporation, G. & L. Distributors and George A. Rosenbloom, filed.

Dec. 3. Plaintiffs' notice of appeal against judgment dismissing complaint as to City of Philadelphia, et al., filed.

Dec. 3. Copy of notice to U. S. Court of Appeals filed.

Dec. 3. Plaintiffs' bond for costs on appeal filed.

Dec. 6. Record transmitted to U. S. Court of Appeals.

COMPLAINT

1. The plaintiff, Outdoor American Corporation, is a corporation duly organized under the laws of the State of Washington, doing business in the City and County of Philadelphia, Pennsylvania, and engaged in the publication of Nudist Publications, which is shipped throughout the United States for distribution.

2. The plaintiff, G. & L. Distributors, is a partnership registered under the Fictitious Names Act in the County of Philadelphia and Commonwealth of Pennsylvania and is engaged in the wholesale sale of magazines and paperback books in the City of Philadelphia, Pennsylvania, and elsewhere.

3. The plaintiff, George A. Rosenbloom, is a resident of the City of Philadelphia, Pennsylvania, and one of the owners and one of the operators of the G. & L. Distributors.

4. The defendant, City of Philadelphia, is a first class city in the County of Philadelphia, Pennsylvania, conducting a municipal government under a "Home Rule Charter".

5. The defendant, Howard R. Leary, is the duly appointed Police Commissioner of the said City of Philadelphia.

6. The defendant, James C. Crumlish, Jr., is the duly elected District Attorney for the said City and County of Philadelphia and holds that statutory office.

* * * * * * * * *

* Not printed in Appendix to Brief

10. This action is brought pursuant to and the jurisdiction of this Court is founded upon, the Federal Statute, 28 U. S. Code, Sec. 1343, which provides, inter alia: "district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . to redress the deprivation, under color of any state law . . . of any right, privilege or immunity secured by the Constitution of the United States. . . ."

11. The plaintiff, Outdoor American Corporation, publishes in the State of Washington and elsewhere and causes to be distributed throughout the United States to certain wholesalers the following Nudist Publications:

Eden, Paradise, American Nudist, The Naturist, Sun Fun, Nude World, American Sunbather Magazine, Hellas, Naturist Life, The Nudists and Nudist Primer.

12. The plaintiff, G. & L. Distributors, by one of its owners and operators, George A. Rosenbloom, orders and purchases magazines and paperback books printed and published in many states of the United States, almost entirely outside of the Commonwealth of Pennsylvania. Immediately upon receipt of said magazines and books, plaintiffs herein, distribute the magazines and books, as a wholesaler, to retail outlets throughout the City and County of Philadelphia, Pennsylvania, and elsewhere. The customers of plaintiffs herein, are newsstands, drug stores, candy stores, and other vendors of magazines and books.

13. Beginning in the recent past, continuing in the present, and threatening to continue in the future, the defendants, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., and their subordinates have deliberately embarked upon a campaign to prevent the wholesale sale or retail sale or display of plaintiffs' nudist books and maga-

zines which they have determined are obscene, and are acting under color of the Pennsylvania Statute making sale of obscene literature a felony. Act of 1939, June 24, P. L. 874, Sec. 524, as amended, 18 Purdon's Stats. Ann., Sec. 4524, and under such color is depriving plaintiffs of their constitutional rights, privileges and immunities.

14. Among the magazines for which plaintiff, G. & L. Distributors, is the sole and exclusive local distributor and wholesaler are as enumerated in paragraph 11 of this Complaint. All of said magazines come to plaintiff from a point outside the Commonwealth of Pennsylvania, and constitute a part of the stream of interstate commerce.

15. The defendants, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., have marshalled all resources of their respective offices for the purpose of preventing the sale, distribution, or display of any of the publications referred to in paragraph 11 of this Complaint.

16. Pursuant to the defendants' plan to prevent the sale, distribution and display of the foregoing books and magazines, on or about October 1, 1963, without any search warrant and under color of the statute as hereinbefore mentioned in paragraph 13 of this Complaint, the defendant, City of Philadelphia, through its agents, servants and employees, the defendant, Howard R. Leary, Police Commissioner and his subordinates, did arrest the plaintiff, George A. Rosenbloom, and confiscate and seize the property of the plaintiff, G. & L. Distributors, 18 boxes of books and magazines which included Nudist, Natures Life Hellas, Eden, Naturalist, Sun Fun, American Nudist Leader, and Paradise. Following this, the defendant, James C. Crumlish, Jr., District Attorney, through his subordinates, commenced criminal prosecution.

17. Pursuant to the defendants' plan, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., to prevent the sale, distribution and display of the foregoing books and magazines, on or about October 4, 1963, police officers, acting pursuant to the direction and under the authority of the defendants, City of Philadelphia and Howard R. Leary, Police Commissioner, entered the premises of plaintiffs, George A. Rosenbloom and G. & L. Distributors, and pursuant to an illegal warrant for search and seizure, seized the following for purpose of illegal confiscation: 17 cartons containing 1700 Eden Magazines, 288 Naturalist Life, 8 Nude World, 13 Paradise, 1 Sunbather, 1 Naturist, 1 Eden, 1 Sunshine Health, 157 Hellas Vol. 2 #10, 287 Hellas Vol. 1 #5, 5 Hellas Vol. 2 #9. Following this, the plaintiff George A. Rosenbloom was arrested and the defendant, James C. Crumlish, Jr., District Attorney, through his subordinates commenced criminal prosecution.

18. The foregoing arrest and seizure was illegal and without authority of law.

* * * * * * * *

26. The above said arrest was made at the instance of the defendants, City of Philadelphia, Howard R. Leary, through their agents, servants and employees, maliciously and without reasonable and probable cause.

27. The plaintiff, George A. Rosenbloom, avers that he has been put to great expense by the employment of counsel to represent him in connection with the unjust charges brought by the said defendant, City of Philadelphia, through their agents, servants and employees against him, and he

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* Not printed in Appendix to Brief.

has been caused great humiliation, pain and suffering incident to his arrest; he avers further that his reputation and good character have been damaged by reason thereof, and he has suffered great financial damage by reason of the loss of his consumers caused by the said arrest.

28. The plaintiff, George A. Rosenbloom, further avers that by reason of the wilful and malicious acts of the defendants as aforementioned, he, George A. Rosenbloom, is entitled to punitive damages, in addition to compensatory damages, both of which he hereby claims of the defendants, as aforementioned.

29. Despite numerous requests by plaintiffs of defendants, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., the defendants have failed and refused to return any of said seized books and magazines, defendants herein contending that they have legally confiscated all of said material, thereby depriving plaintiffs of an opportunity to sell said magazines and books for profit, or to return to the national distributor, said books or magazines for credit.

30. The police officers, acting under the direction and authority of the Police Commissioner, possessed a document entitled "Warrant for Search and Seizure" which was invalid and illegal, in that it declared only that the said police officers might search for "obscene materials" which, under the Constitution of the United States, is insufficient authority for search and seizure.

31. As a result of the actions of the defendants, nearly all retail outlets in Philadelphia County have returned all the magazines and paperback books listed in paragraph 11 to plaintiffs and other magazines of a similar or like nature, thereby causing grave and irreparable harm to plaintiffs.

32. Defendants have adopted a criterion of obscenity which declares that nudity is obscenity. In addition, defendants have adopted and are enforcing a criterion that bare breasts or bare buttocks constitutes obscenity when appearing in a magazine or book.

33. Defendants, Police Commissioner and District Attorney, have illegally set themselves up as censors of magazines and books which may be distributed in Philadelphia County.

34. The actions of the defendants have caused, and unless restrained will continue to cause, plaintiffs irreparable harm, damage and injury.

35. The actions of defendants City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., constitute a prior restraint on communication, set up a censorship of magazines and books, and render herein defendants as censors of magazines and books for the County of Philadelphia, all in violation of the rights of the plaintiffs under the provisions of the First and Fourteenth Amendments to the Constitution of the United States.

36. The actions of defendants City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., violate the rights of freedom of speech and of press of plaintiffs and constitute a denial of the freedom of expression guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

37. The actions of the defendants City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., deprive plaintiffs of valuable property rights without due process of law, in violation of the Fourteenth Amendment to the Constitu-

tion of the United States, in that plaintiffs are prevented from continuing to engaged in the lawful business of the wholesale sale and distribution of magazines and books in Philadelphia County.

38. The actions of defendants City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., are arbitrary, unreasonable, and in excess of duly constituted legal authority and without any basis in law.

39. Plaintiffs believe and aver that defendants, City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., have exceeded their lawful powers and by their arbitrary action, have caused irreparable injury to plaintiffs' rights, whereby plaintiffs are entitled to apply to equity for an injunction against defendants, enjoining defendants from continuation of the prior practices, procedures and conduct.

WHEREFORE, plaintiffs ask judgment and relief of this Court as follows:

(a) Declaring that none of the various issues of the magazines and books as enumerated in paragraph 11 of this Complaint constitutes hard-core pornography, or is obscene, or is subject to governmental suppression, in accordance with the definition of obscenity as established by the United States Supreme Court, in the case of *Roth v. United States*, 554 U. S. 476 (1957), consistent with the guarantees of the Federal Constitution.

(b) Directing and ordering City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., their employees, subordinates and agents, and all persons acting for or in their behalf and in concert with them to restrain from directly or indirectly threatening the

plaintiffs, their agents, employees, customers or prospective customers and other outlets for magazines and periodicals sold by the hereinmentioned plaintiffs with the institution of any suit, criminal or civil, arrest or seizure of merchandise, or instituting a multiplicity of suits against the herein mentioned plaintiffs, their vendees or successors, based upon the sale, purchase, display or possession of any nudist magazines or publications as enumerated in paragraph 11 of this Complaint.

(c) Directing and ordering City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., to return to the plaintiffs the said magazines and books which they have confiscated from the plaintiffs as alleged in paragraph 16 and 17 of this Complaint.

(d) In issuing an Injunction preliminarily, and then permanently, enjoining the defendants from continuing the acts, conduct and charges hereinbefore complained of.

* * * * * * * *

(f) Declaring that the actions of City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., violate the rights of freedom of speech and of press of plaintiffs, contrary to the provisions of the First and Fourteenth Amendments to the Constitution of the United States.

(g) Declaring that the actions of City of Philadelphia, Howard R. Leary, James C. Crumlish, Jr., deprived the plaintiffs of valuable property rights, without due process of law.

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* Not printed in Appendix to Brief.

(h) Entering a judgment against the defendants in favor of the plaintiffs for damages sustained, which damages plaintiffs aver will aggregate in excess of One Million ($1,000,000.00) Dollars.

(i) For such other and further relief as may be deemed appropriate by this Honorable Court to your plaintiffs may in justice and equity and right be entitled.

And plaintiffs will ever pray, etc.

BENJAMIN PAUL,
Attorney for Plaintiffs.

DEFENDANTS' MOTION TO DISMISS.

Defendants City of Philadelphia, Howard R. Leary, and James C. Crumlish, Jr., move the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against defendants City of Philadelphia, Howard R. Leary, and James C. Crumlish, Jr., upon which relief can be granted.

2. To dismiss the action against defendant City of Philadelphia because the City of Philadelphia, as a municipality, is not "a person" within the meaning of Title 42 U. S. C. A. 1981, et seq., so as to give the plaintiffs a right of action.

3. To dismiss the action against defendant City of Philadelphia because the Court lacks jurisdiction to entertain

a civil claim against the City of Philadelphia under Title 42 U. S. C. A. 1981, et seq.

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EDWARD G. BAUER, JR.,
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OPINION AND ORDER

JOHN W. LORD, JR., J. November 20, 1963.

Plaintiffs' Complaint in Equity filed October 14, 1963, and amended October 22, 1963, named six defendants. By order of this Court filed November 20, 1963, the three defendants last named in the original caption of this case (hereinafter called News Media defendants) have been dismissed for reasons not necessary to notice in this Opinion but set out in the Order. The remaining defendants are the City of Philadelphia and two of its officials, Howard R. Leary, Police Commissioner and James C. Crumlish, Jr., District Attorney. This opinion will deal solely with the questions of law raised by them.

The respective plaintiffs are publishers and distributors of nudist literature. Outdoor American Corporation, organized under the laws of the State of Washington, publishes nudist magazines and paperback books and ships them throughout the United States. The second named

plaintiff, G. & L. Distributors (hereinafter called G. & L.), is a partnership engaged in the wholesale distribution and sale of magazines and paperback books in the City of Philadelphia and elsewhere. The third and last-named plaintiff is one of the owners and operators of G. & L., George A. Rosenbloom.

Defendants Leary and Crumlish are citizens and residents of the Commonwealth of Pennsylvania, and the City of Philadelphia is a municipal corporation of Pennsylvania.

Outdoor American is a Washington corporation which does not have its principal place of business in Pennsylvania. G. & L. is a partnership registered under the Fictitious Names Act in the County of Philadelphia and Commonwealth of Pennsylvania. George A. Rosenbloom is a resident of the City of Philadelphia, Commonwealth of Pennsylvania.

Thus, all parties except Outdoor American Corporation are citizens of the Commonwealth of Pennsylvania. By Amendment filed October 22, 1963, plaintiffs asserted jurisdiction on the grounds of diversity of citizenship and amount. It is, however, patent that there is no diversity under 28 U. S. C. A. §1332(a)(1), since all defendants are citizens of the same state as some of the plaintiffs. *Rader v. Manufacturers Cas. Ins. Co. of Philadelphia*, 242 F. 2d 419 (2nd Cir. 1957); *Russell v. Basila Mfg. Co.*, 246 F. 2d 432 (5th Cir. 1957).

From the briefs and arguments of law of plaintiffs it is seen that the diversity of citizenship was alleged as grounds for jurisdiction only as to the three News Media defendants who have heretofore been dismissed. As the case now stands, it is clear that if jurisdiction of this Court is to be maintained, it must stand on grounds other than diversity. The original complaint based jurisdiction on the so-called Civil Rights statute, 28 U. S. C. A. §1343, and set out the following provisions thereof:

> ". . . district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . to redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution of the United States . . ."

Plaintiffs list nine periodicals and two paperback books which Outdoor American prints and ships to the distributor plaintiffs among others: *Eden*, *Paradise* and so on. Since the merits will not be reached herein, it is unnecessary to name or discuss the material in question.

Plaintiffs aver the following facts:

That early in October, 1963, plaintiff Rosenbloom was arrested in Philadelphia by the Philadelphia police for violation of the Pennsylvania statute which makes dealing in obscene publications a felony. Plaintiffs allege that under color of the Act in question; defendants are depriving them of their constitutional rights, privileges and immunities. Act of 1939, June 24, P. L. 874 §524 as amended, 18 Purd. Stat. Ann. §4524.

Plaintiffs allege that this arrest and deprivation is part of a deliberate campaign by defendants to prevent the wholesale or retail sale or display of plaintiffs' nudist books, which they have determined are obscene.

Other acts of deprivation by defendants are recited in addition to the arrest of plaintiff Rosenbloom in that they: seized 18 boxes of books and magazines, property of G. & L., containing approximately 2500 copies of the nine publications in question; started a criminal prosecution of Rosenbloom under the cited statute; failed to return the seized material on request; adopted a criterion of obscenity which declares that nudity is obscenity; defendants Leary and Crumlish have set themselves up as censors of books and magazines which may be distributed in Philadelphia County

in violation of the rights of plaintiffs under the provisions of the First and Fourteenth Amendments to the Constitution of the United States; in particular have denied plaintiffs their constitutional rights of freedom of speech and freedom of expression; have prevented plaintiffs from continuing to engage in their lawful business in Philadelphia County, thus depriving them of valuable property rights without due process of law in violation of the Fourteenth Amendment; and that the actions of the defendants are arbitrary, unreasonable, in excess of duly constituted legal authority, and without any basis in law. In addition it is repeatedly alleged that the described arrest, search and seizure was illegal in various respects. Finally, in the lengthy complaint there are various other allegations, obviously of a conclusory nature, not necessary to notice here.

The relief sought includes the following requests: a declaration that none of the "various issues" of the plaintiffs' eleven listed publications constitutes hard-core pornography, or is obscene, or is subject to governmental suppression, in accordance with the definition of obscenity stated in *Roth v. United States*, 354 U. S. 476 (1957); a preliminary injunction (thereafter to be made permanent), on grounds of threatened irreparable injury, against the "continuation of the prior practices, procedures and conduct" of these defendants; restraining defendants from threatening the plaintiffs or their customers with arrest, search, seizure or prosecution of the plaintiffs' eleven periodicals, or starting suits against them in connection with dealings with these publications; directing defendants to return the seized periodicals; declaring the defendants' actions violative of the plaintiffs' constitutional rights of property, freedom of speech, and freedom of the press; and also asks judgment for damages sustained in the amount of one million dollars.

Plaintiffs' request is not a modest one. It asks this Court to exercise its power to the very limit of its scope and func-

tion, if not considerably beyond. Argument has been heard on the Motions to dismiss of the several defendants; memoranda of law have been received from all parties; have been duly considered; and the Court is prepared to grant defendants' motions to dismiss for the following reasons.

Insofar as the plaintiffs seek by indirection to enjoin criminal prosecutions in the Commonwealth of Pennsylvania, they ask the Court to assume a task which has been undertaken only in the gravest emergencies. *Stefanelli v. Minard*, 342 U. S. 117, 120 (1951).

The case last cited involved an interpretation of the very statute which is invoked as ground for jurisdiction in the instant case, the so called Civil Rights statute derived from the Act of April 20, 1871. 28 U. S. C. A. §1343. It was there decided that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful seizure. *Stefanelli v. Minard*, 342 U. S. 117, 120 (1951).

The circumstances under which that statute was enacted, and the evils it was designed to remedy, were given even more detailed attention by the United States Supreme Court in 1961. *Monroe v. Pate*, 365 U. S. 167, 171-188. It was pointed out that the statute was made necessary by the activities of the Ku Klux Klan. It was designed to provide a remedy to parties deprived of rights by an official's abuse of his position, but it was not intended to apply to municipal corporations. There, the Supreme Court of the United States held that the tort claims brought by a negro family who were subjected to a violent invasion of their rights by Chicago police officers did not state a cause of action against the City of Chicago, but only against the named police officers. *Monroe v. Pate*, 365 U. S. 167 (1961).

More recently, however, a charitable organization secured prospective relief against a city ordinance which arbitrarily restricted community and charity campaigns. *Adams v.*

City of Park Ridge, 293 F. 2d 585 (7th Cir. 1961). Jurisdiction was based on the same statute, 28 U. S. C. A. §1343, but the Court of Appeals distinguished *Monroe v. Pate*, supra, on the ground that the case before it dealt with an unconstitutional legislative enactment of the municipal corporation rather than a tort. *Adams v. City of Park Ridge*, 293 F. 2d 585, 587 (7th Cir. 1961).

It is believed that the Seventh Circuit decision last cited has no bearing on the applicability to the present case of *Monroe v. Pate*, since plaintiffs have made no claim that the Pennsylvania Obscenity Statute is unconstitutional.

Perspective is gained by reference to the succinct explanation of Judge Maris in *Williams v. Yellow Cab Co.*, 200 F. 2d 302, 307 (3rd Cir. 1952); *cert. den.* 346 U. S. 840, *sub nom. Dargan v. Yellow Cab Co.* (1953):

> ". . . jurisdiction is claimed [under] Section 1343 of Title 28, United States Code, commonly known as the Civil Rights Act . . . The Civil Rights Act was originally enacted to enforce the Fourteenth Amendment. It has long been settled that the Fourteenth Amendment is directed only to state action and that the invasion by individuals of the rights of other individuals is not within its purview. It necessarily follows that the jurisdiction conferred upon the federal district courts by Section 1343 is similarly limited and that *redress for the invasion by an individual of the civil rights of another must be sought in the state courts*, unless, of course, diversity of citizenship is present." (Emphasis added.)

That language has been frequently cited, and the principle has been invoked in many cases since 1952, e.g., *Davis v. Foreman*, 251 F. 2d 421, 422 (7th Cir. 1958).

From the foregoing it seems clear that if plaintiffs are to maintain their action, it must be against the two named

public officials, Leary and Crumlish, for abuse of their official positions, and not against the defendant municipality.

Plaintiffs have cited a great many cases decided by the United States Supreme Court and other federal courts having to do with obscenity. Only a few will be mentioned.

In *Roth v. United States*, 354 U. S. 476 (1957), two statutes, federal and Californian respectively, were involved. Roth had been convicted for a violation of the federal obscenity statute, and Alberts had likewise been convicted under the California statute. Both statutes and convictions were challenged. In both cases, the statutes were held not unconstitutional, and the convictions were affirmed since the lower courts had applied proper standards of interpretation of those statutes. It is to be noted that the Roth case was a federal statutory case, and the Alberts case involved an attack on a state conviction under a state statute. In neither case was prospective relief sought.

The other cases involved nudist magazines. One of the latest is *Sunshine Publishing Company v. Summerfield*, 184 F. Supp. 767 (D. C. 1960). Its specific conclusion was that two particular nudist publications, *Sunshine and Health*, and *Sun Magazine* (neither of which are presently involved) were entitled to second class mailing privileges.

In the case last cited, a long footnote details the prior litigation. *Sunshine Publishing Company v. Summerfield*, 184 F. Supp. 767, 768 n. 1 (D. C. 1960). In the course of the opinion it was noticed that there was a tacit holding that certain issues of the two periodicals were not obscene in *Sunshine Book Co. v. Summerfield*, 355 U. S. 372 (1958). Notice was also taken of the reading given that case in *Poss v. Christenberry*, 179 F. Supp. 411 (S. D. N. Y. 1959), where Judge Frederick van Pelt Bryan wrote:

> ". . . It is plain that the Supreme Court in the Sunshine Book case did not give blanket approval to all

material containing nude photographs. It held only that the magazine there under consideration, published by a bona fide group devoted to the cult of nudism, and containing pictures of nudists in the nude, was not obscene. There was no question of the sincerity of purpose of the publishers and the objective of the photographs and text was not an appeal to prurient interest." *Poss v. Christenberry*, 179 F. Supp. 411, 416 (S. D. N. Y. 1959).

Since the objection of obscenity had been withdrawn by the defendant Postmaster General in the District of Columbia case, and it involved periodicals not here in question, and entirely different statutes, it is not possible to say that the Sunshine cases are in any sense controlling in the present matter. *Sunshine Publishing Company v. Summerfield*, 184 F. Supp. 767 (D. C. 1960) and cases cited therein.

To follow the long battle of certain other nudist publications in the courts is, for that matter, entirely beyond the scope of the problem at hand. The present problem is governed by a much different line of authority.

In *Grove Press, Inc. v. Calissi*, 208 F. Supp. 580 (1962), the United States District Court for the District of New Jersey was asked to restrain New Jersey Law Enforcement authorities from proceeding under the New Jersey obscenity statute against the book "Tropic of Cancer" and the sellers thereof. The three-judge District Court dismissed the bill of complaint, finding that there was no showing of a danger of irreparable injury both great and immediate and there was no showing that the New Jersey courts would deal with the matter other than fairly, wisely and expeditiously. *Grove Press, Inc. v. Calissi*, 208 F. Supp. 580, 583-4 (D. N. J. 1962).

Also in point, and very close to the present case on certain of the facts is *Toth v. Silbert*, 184 F. Supp. 163 (N. D.

Ohio 1960). In that case there was pending against plaintiff an indictment in the Ohio courts for possession and exhibition of magazines and books, alleged to be obscene. Plaintiff sought to enjoin prosecution, asserting violation of his constitutional rights on many of the grounds argued by the plaintiffs in the present case. On the authority of *Douglas v. City of Jeannette*, 319 U. S. 157 (1943), the three-judge court declined to intervene in the absence of a showing of the irreparable injury, clear and imminent, which alone justifies interference in state proceedings. *Toth v. Silbert*, 184 F. Supp. 163, 168 (N. D. Ohio 1960, authorities collected at page 169). If a federal court of equity will not interfere to prevent State authorities from using evidence obtained in an unlawful search in a pending criminal prosecution, *Stefanelli v. Minard*, 342 U. S. 117 (1951), all the more will it not enter into a state case once begun, because it is "perhaps the most sensitive source of friction between States and Nation". *Ibid.*, 184 F. Supp. 163, 169.

As has been said so many times, there is no reason to assume, at this stage, that the Courts of Pennsylvania will not do justice. The Pennsylvania statute, which plaintiffs are alleged to have violated, has not been challenged here. It is not for this Court to assume that the proper standards will not be applied in the interpretation of that statute.

For all the foregoing reasons, it is the ruling of this Court that the Motions to Dismiss of Defendants, CITY OF PHILADELPHIA, HOWARD R. LEARY and JAMES C. CRUMLISH, JR., are hereby GRANTED and the Complaint of Plaintiffs, OUTDOOR AMERICAN CORPORATION, G. & L. DISTRIBUTORS, and GEORGE A. ROSENBLOOM will accordingly be DISMISSED, and it is SO ORDERED.

/s/ JOHN W. LORD, JR.,

J.

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME.

(Received and Filed February 10, 1964.)

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The motion of the City of Philadelphia respectfully represents:

1. That the City of Philadelphia, its District Attorney and its Chief of Police are appellees in the above appeal. Appellants have appealed from an order of the District Court for the Eastern District of Pennsylvania granting appellees' motion to dismiss appellants' Complaint. Said Complaint sought to enjoin the appellees from interfering with the display and sale of so-called "nudist" publications.

2. Appellants' brief herein was filed on December 30, 1963.

3. Because of the press of litigation in the Law Department of the City of Philadelphia, the appellees' brief has just been able to be completed and is being delivered to the printer this date.

WHEREFORE, the appellees move your Honorable Court to permit them to field their brief in the above entitled matter out of time.

MATTHEW W. BULLOCK, JR.,
Deputy City Solicitor,
EDWARD G. BAUER, JR.,
City Solicitor,
Attorneys for the Appellees.

OPINION OF THE COURT.

(Filed June 30, 1964.)

By LEAHY, District Judge.

Plaintiffs are publishers and distributors of nudist magazines and paperback books. In October, 1963, defendants confiscated a large quantity of plaintiffs' publications and arrested and are prosecuting plaintiff Rosenbloom in the Pennsylvania criminal court for violation of the Pennsylvania statute which makes dealing in obscene publications a felony.[1] Suit was brought by plaintiffs in the United States District Court for the Eastern District of Pennsylsylvania for a declaratory judgment and injunctive relief under the Civil Rights Act.[2] Upon defendants' motion, the district court dismissed the complaint on the grounds there was no showing of irreparable injury, clear and imminent, so as to justify interference in state proceedings and the City of Philadelphia is not a proper party under the Civil Rights Act. Though the entire complaint was dismissed, plaintiffs appeal only from dismissal of their cause against City of Philadelphia, Police Commissioner Howard R. Leary, and District Attorney James C. Crumlish, Jr.

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[1] Act of 1939, June 24, P. L. 874, §524, as amended. 18 Purd. Stat. §4524.

[2] 28 U. S. C. §1343 provides in material part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * * * * * * *

"(3) To redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution of the United States. . . ."

Plaintiffs allege defendants are depriving them of their constitutional rights, privileges and immunities under color of the Pennsylvania Statute. Also, the arrests and deprivation is part of a deliberate campaign by defendants to prevent wholesale or retail sale or display of plaintiffs' publications which they, acting as censors, have determined are obscene. Further, plaintiffs allege defendants have adopted a criterion that nudity is obscenity; valuable property has been taken without due process of law; freedom of speech and freedom of expression have been denied them; the arrests are illegal; and the actions of defendants are without any basis in law.

Relief sought includes a declaration none of the publications in question constitutes hard-core pornography, or is obscene, or is subject to governmental suppression in accordance with the definition of obscenity stated in Roth v. United States, 354 U. S. 476 (1957); a preliminary injunction (thereafter to be made permanent) against continuation of prior practices, procedures and conduct of defendants; restraining defendants from threatening plaintiffs or their customers with arrest, search, seizure or prosecution of their publications; directing defendants to return seized publications; and declaring defendants' actions violative of plaintiffs' constitutional rights of property, freedom of speech, and freedom of press.

Decisive of this appeal is the question whether the district court in the exercise of its discretion was correct in refusing to use its equitable power. Plaintiffs concede federal courts will not interfere with a state's criminal prosecution. However, they contend a reading of their complaint demonstrates only one prayer for relief among several concerned suppression of evidence. Thus, plaintiffs argue, the fact they may not be entitled to all relief sought does not warrant dismissal of the entire action. We disagree with plaintiffs' basic contention only one request re-

quires interference with state proceedings. All, at least by indirection, do.

Plaintiffs prayer for a declaration the publications in question are not obscene is a circuitous way of requesting the district court "to interfere with or embarrass" state proceedings. Whether the court should abstain from passing upon the merits of this litigation, leaving that decision to the state courts, is the crucial question raised by the request for a declaratory judgment. No reason for the district court to involve itself with the basic question of obscenity at this time exists. The decision of the state courts may result in plaintiffs' obtaining the objectives they now seek. If not, petition to the Supreme Court of the United States for writ of certiorari remains. As Mr. Chief Justice Stone for the Supreme Court in Douglas v. City of Jeannette, 319 U. S. 157, 163 (1943), stated:

> "Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds."

Danger of irreparable injury both "clear and imminent" has not been shown. Since there are three plaintiffs in the

matter before the federal court and only one involved in state proceedings, it is argued a finding of not guilty in the state courts of one of plaintiffs is no protection to the others. The fact only one plaintiff is being prosecuted in the state courts is without independent legal significance, since publications involved are the same as to each plaintiff. All issues plaintiffs are raising in the federal court may be brought before the state courts, and there is no reason to believe state officials will enforce the Pennsylvania statute against plaintiffs not involved in state proceedings if the publications are found not obscene in the pending criminal prosecution. If held obscene, plaintiffs not involved in state proceedings cannot complain of enforcement of the statutes. Nor should a federal court of equity ambush the state courts by deciding the fundamental basis of obscenity.

Paragraph (c) under the prayer for relief, which requests return of seized publications, makes no mention of time. Therefore, plaintiffs argue, if time for their return was fixed by the court as after state proceedings, there could be no interference with the State. But there is no suggestion, and we cannot assume the materials will not be returned to the proper people if found not obscene. If held obscene, plaintiffs cannot complain of confiscation.

So far as the preliminary injunction is concerned, plaintiffs contend it is directed at future unconstitutional acts and is supported by Refoule v. Ellis, D. C. Ga., 74 F. Supp. 336, 343, wherein the following is stated:

> "This does not violate the general principle that equity does not ordinarily interfere with the administration of criminal law . . Plaintiff seeks to enjoin not the administration of criminal laws by the State of

> Georgia, but the illegal manner of administration by defendants as agencies of the State."

As in *Refoule*, plaintiffs argue they seek to enjoin not state proceedings, but unlawful harassment by local officials. Harassment will continue regardless of outcome of pending criminal proceedings, according to plaintiffs, unless injunctive relief is granted.

As a result of unlawful arrest, detention and interrogation by the Georgia police, plaintiff in *Refoule* sought an injunction and damages. In an apparent attempt to establish a case of sodomy against plaintiff, the police on four occasions arrested him, held him incommunicado, and subjected him to questioning for long hours under unusual circumstances and in unusual places. Defendants "failed to express any intention to cease the commission of such acts in the future, but on the other hand, have strongly insisted that they were within their rights in doing what they have done and in continuing to do so in the future if they find it desirable to do so." Thus, Georgia police not only committed flagrant violations of plaintiff's civil rights, but in addition threatened to continue to do so. No such situation exists here. No doubt defendants intend to enforce the Pennsylvania statute against plaintiffs' publications until final adjudication of their obscenity. However plaintiffs are not warranted in assuming state officials would misuse their power or refuse to acquiesce in a decision of the state courts favorable to plaintiffs. Continued criminal prosecution regardless of outcome of pending state proceedings is an unwarranted assumption not sufficient to establish irreparable injury. While plaintiffs may be sustaining some inconvenience and loss "[I]t does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding

brought lawfully and in good faith . . .'" *Jeannette, supra*, 164.

Cases cited by plaintiffs as authority for granting injunctive relief are inapposite, since they do not involve collateral proceedings in state courts. In the instant action, usual criminal procedures with their constitutional safeguards were invoked, and there is no reason to believe defendants will not be respectful of the Federal Constitution and laws. As observed by the district court:

> "As has been said so many times, there is no reason to assume, at this stage, that the Courts of Pennsylvania will not do justice. The Pennsylvania statute, which plaintiffs are alleged to have violated, has not been challenged here. It is not for this Court to assume that the proper standards will not be applied in the interpretation of that statute."

Whether City of Philadelphia is a proper party under the Civil Rights Act need not be resolved, since we find no ground for supposing intervention of a federal court in order to secure plaintiffs' constitutional rights will be either necessary or appropriate.

The order of the district court dismissing plaintiffs' complaint will be affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[a] Cf. Grove Press, Inc. v. Calissi, D. C. N. J., 208 F. Supp. 580, and Toth v. Gilbert, N. D. Ohio, 184 F. Supp. 163. In both cases complainants as businessmen suffered the same kind of inconvenience and possible financial loss plaintiffs herein are alleged to be suffering. In both cases, as in the present case, there is no suggestion the Federal Constitution and laws will not be respected by the state court.

JUDGMENT

(Received and Filed June 30, 1964.)

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed November 20, 1963, dismissing plaintiffs' complaint be, and the same hereby is affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

June 30, 1964.

PETITION FOR REHEARING

(Received and Filed July 9, 1964.)

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The above captioned Petitioners, by their attorney Benjamin Paul, respectfully represents:

1. That on October 1, 1963 and again on October 4, 1963, Petitioners' books and magazines of the nudist type were confiscated by the police of the City of Philadelphia and the petitioner George A. Rosenbloom arrested under color of the Pennsylvania Statute making sale of obscene litera-

ture a felony (Act of 1939, June 24, P. L. 874, Sec. 524, as amended; 18 Purdon's Stats. Ann., Sec. 4524).

2. On each occasion, immediately thereafter, the petitioner George A. Rosenbloom was admitted to bail, the District Attorney commenced his prosecution, and the books and magazines of the Petitioners confiscated and their further distribution prevented by these governmental authorities without any prior judicial determination as to their obscenity or violation of the law, all in violation, procedurally, of the law as propounded by the United States Supreme Court in *Marcus v. Search Warrants*, 367 U. S. 717, 8 S. Ct. 1708 (1961).

> "But there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor. An opportunity comparable to that which the distributor in *Kingsley Books*[1] might have had to circulate the publications despite the interim restraint and then raise the claim of nonobscenity by way of defense to a prosecution for doing so was never afforded these appellants because the copies they possessed were taken away. Their ability to circulate their publications was left to the chance of securing other copies themselves subject to mass seizure under other such warrants. The public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to outwit the police by obtaining and selling other copies before they in turn could be

---

[1] **Kingsley Books, Inc. v. Brown**, 354 U. S. 436.

seized. In addition to its unseemliness, we do not believe that this kind of enforced competition affords a reasonable likelihood that nonobscene publications, entitled to constitutional protection, will reach the public. A distributor may have every reason to believe that a publication is constitutionally protected and will be so held after judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seizes it from him" (Marcus v. Search Warrants, supra).

3. That on October 14, 1963, Petitioners filed a civil complaint with the United States District Court for the Eastern District of Pennsylvania alleging that their constitutional rights to freedom of Press, Speech and Due Process were being violated by the State authorities and by authority of the "Civil Rights Act" (28 U. S. C., Sec. 1343), a declaratory judgment, injunction relief, temporary and then permanent, and damages was sought.

4. That on October 15, 1963, a Temporary Restraining Order was refused by the lower Court.

5. That on November 20, 1963, Petitioners' entire complaint was dismissed by the lower Court on the grounds that Petitioners sought by indirection to enjoin criminal prosecutions in the Commonwealth of Pennsylvania undertaken only in the gravest emergencies.

6. That during all this time Petitioners' books and magazines were still confiscated and held by the state authorities after local proceedings were initiated by the Petitioners to have them returned, with no avail and no remedy but to wait for the conclusion of the State's criminal proceedings.

7. On or about May 11, 1964, some seven months after the original arrest and confiscation the Petitioner George A. Rosenbloom was found not guilty of the alleged obscenity charges and the books and magazines with some difficulty were returned; there still being a large number held by the state authorities in conjunction with other defendants under arrest.

8. That on June 30, 1964, after an appeal had been taken to this Court from the judgment of the lower Court on December 3, 1963, this Court entered an order affirming the order of the lower Court on the grounds that danger of irreparable injury both "clear and imminent" has not been shown and that while petitioners may be sustaining some inconvenience and loss it does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith.

9. That this Court's decision was erroneous in that it leaves the Petitioners as well as any other citizen without any immediate and direct remedy for a violation of his civil and constitutional rights when State authorities by means of a criminal prosecution prevent the free expression of speech and press for a period as in this case for over seven months and more and is still continuing.

10. Petitioners have always maintained that the manner in which the State authorities confiscated their books and magazines were illegal and that a prior determination before any arrest or confiscation, in keeping with the "*Marcus*" decision and the protection of constitutional guarantees would have been the proper course. This, so that until proven, a citizen's liberty could not be suspended and made the victim of the law's long delay. This, also, in

much the same manner as a citizen is admitted to bail when he is accused, so that his liberty until otherwise determined is safeguarded. Speech and Press as any other liberty should have some form of bail. Here a temporary injunction is the answer. The question of obscenity is not as important as the method used to determine it. There is no authority in the land that would not come to the aid of a man held in custody without due process of law. It is the Petitioners' prayer that a citizen's expressions and ideas should be given that same aid by the federal courts when the State authorities take that direction. Petitioners most ardently and sincerely believe that to deny a citizen free expression for even one moment as well as seven months and more is not slight or inconsequential and is irreparable. It is of the nature where the Federal authorities by virtue of the "Civil Rights" law must direct the states.

WHEREFORE, your Petitioners respectfully request that this matter be circulated to all the Judges of the United States Court of Appeals for the Third Circuit for their deliberation and for such action as is properly indicated upon consideration of the facts set forth hereinabove. Your Petitioners further respectfully request that if this Petition is denied, the Court indicate the ground upon which such denial is based.

Respectfully submitted,

BENJAMIN PAUL,
1405 Locust Street,
Philadelphia 2, Pa.

CERTIFICATION.

This is to certify that this Petition is presented in good faith and not for delay.

BENJAMIN PAUL,
Attorney for Petitioners.

ANSWER TO PETITION FOR REHEARING.

(Seal) CITY OF PHILADELPHIA

Law Department
703 City Hall Annex
Philadelphia, Pa. 19107
Edward G. Bauer, Jr.
City Solicitor

July 14, 1964

Mrs. Ida O. Creskoff
Clerk, United States Court of Appeals
Federal Court Building
9th and Market Streets
Philadelphia, Pennsylvania

Re: Outdoor American Corp., et al
v.
City of Philadelphia, et al.—No. 14,697

Dear Mrs. Creskoff:

Pursuant to my telephone conversation with you I am submitting this letter in lieu of a formal answer to the Petition for Rehearing in the above case.

The City of Philadelphia opposes the Petition for Rehearing on the ground that the matter was fully considered by both the United States District Court and the United States Court of Appeals and decisions rendered in conformity with the law.

Moreover, as noted in the Petition for Rehearing, the petitioner was acquitted in the Philadelphia Court of Quarter Sessions of the charge of obscenity, a fact which confirms the fact that petitioner's rights are being protected by the state courts. Indeed, the acquittal was in the form of a directed verdict of not guilty. Since this disposition of the criminal prosecution against the petitioner, the undersigned has noted that nudist publications have again appeared on downtown newsstands in Philadelphia.

Since no legal or practical reason for a rehearing appears, we would urge that the Petition for Rehearing be denied.

Yours very truly,

M. W. BULLOCK, JR.,
Matthew W. Bullock, Jr.
Deputy City Solicitor

MWB, JR: jw

SUR PETITION FOR REHEARING.

(Received and Filed July 21, 1964.)

Present: BIGGS, Chief Judge, McLAUGHLIN, KALODNER, STALEY, HASTIE, FORMAN, GANEY, SMITH and FREEDMAN, Circuit Judges, and LEAHY, District Judge.

The petition for hearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

McLAUGHLIN,
Judge.

Dated: July 21, 1964.

ORDER.

(Received and Filed July 28, 1964.)

Pursuant to Rule 36 (2) of this Court, it is ORDERED that issuance of the mandate in the above cause be, and it is hereby stayed until August 25, 1964.

/s/ McLAUGHLIN,
Circuit Judge.

July 28, 1964.

CERTIFICATION.

I, Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original Appendix for Appellants and proceedings in this Court in the case of OUTDOOR AMERICAN CORPORATION and G. & L. DISTRIBUTORS and GEORGE A. ROSENBLOOM, Appellants, vs. CITY OF PHILADELPHIA and HOWARD R. LEARY, JAMES C. CRUMLISH, JR., THE EVENING BULLETIN, TRIANGLE PUBLICATIONS, INC. and COLUMBIA BROADCASTING SYSTEMS, INC., No. 14,697, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 29th day of July, 1964.

IDA O. CRESKOFF,
Clerk of the U. S. Court of Appeals,
Third Circuit.

(Seal)

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IN THE

Supreme Court of the United States

October Term, 1964

No. 424

OUTDOOR AMERICAN CORPORATION, G. & L. DISTRIBUTORS, and GEORGE ROSENBLOOM, *Petitioners*,

v.

CITY OF PHILADELPHIA, HOWARD R. LEARY, JAMES C. CRUMLISH, JR., THE EVENING BULLETIN, TRIANGLE PUBLICATIONS, INC., and COLUMBIA BROADCASTING SYSTEM, INC., *Respondents*.

Brief of the Municipal Respondents In Opposition to Petition for Writ of Certiorari

MATTHEW W. BULLOCK, JR.
Deputy City Solicitor

EDWARD G. BAUER, JR.
City Solicitor

Attorneys for the Municipal Respondents

705 City Hall Annex
Philadelphia, Pa. 19107

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

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QUESTION PRESENTED FOR REVIEW

Did the United States District Court abuse its discretion in refusing to grant injunctive relief where plaintiffs charged unconstitutional interference with the sale and distribution of nudist publications, where (a) criminal prosecutions were pending in the state court under the state obscenity statute, (b) there was no evidence that the state court would not properly apply Federal law, and (c) there was no evidence that failure to exercise Federal jurisdiction would result in irreparable injury which is clear and imminent?

(Answered in the negative by the Court of Appeals.)

STATEMENT OF THE CASE

The appellants, publisher and distributor of nudist magazines, brought suit in equity in the United States District Court for the Eastern District of Pennsylvania seeking the following relief: (1) a declaration that certain magazines and books seized by the Philadelphia police were not obscene, (2) an injunction restraining the appellees from interfering with the appellants' sale of said magazines and books, and (3) an order directing the return of the seized material.[1] It was not alleged that the Pennsylvania obscenity statute under which the police acted is unconstitutional. At the time the complaint was filed, George Rosenbloom, one of the appellants, and other newsdealers were under indictment charged with violation of the Pennsylvania obscenity statute[2] on account of their sale of the said material.

The United States District Court (Honorable John W. Lord, Jr.) granted the appellees' motion to dismiss the case stating (19a):

> "As has been said so many times, there is no reason to assume, at this stage, that the Courts of Pennsylvania will not do justice. The Pennsylvania statute, which plaintiffs are alleged to have violated, has not been challenged here. It is not for this Court to assume that the proper standards will not be applied in the interpretation of this statute."

The Court of Appeals for the Third Circuit sustained the order of the United States District Court and refused appellants' petition for reargument.

The petition for writ of certiorari herein followed.

---

[1] In the proceedings before the U. S. District Court the complaint was dismissed as to the Evening Bulletin, Triangle Publications, Inc. and Columbia Broadcasting System, Inc. The dismissal as to these defendants was not thereafter contested.

[2] This statute is set forth in full in footnote 1, page 5, of appellants' petition for writ of certiorari.

ARGUMENT

The appellants herein raise two questions: (1) whether they had a right under the United States Constitution to have a hearing as to obscenity under a state statute before confiscation of their publications by the police, and (2) whether the Federal Courts should have exercised their jurisdiction in the present case.

The first question was at no time raised in the proceedings below either before the United States District Court or the United States Court of Appeals.[3] It is well settled law that an appellant may not raise for the first time questions not raised before or considered by the courts below, except under exceptional circumstances. *Lawn v. United States*, 355 U. S. 339, 2 L. ed. 2d 321, 78 S. Ct. 311 (1958); *Duignan v. United States*, 274 U. S. 195, 200, 71 L. ed. 996, 1000, 47 S. Ct. 566 (1927); *Husty v. United States*, 282 U. S. 694, 701, 702, 75 L. ed. 629, 632, 633, 51 S. Ct. 240, 74 A. L. R. 1407 (1931); *United Brotherhood C. & J. v. United States*, 330 U. S. 395, 412, 91 L. ed. 973, 987, 67 S. Ct. 775 (1947). There are no exceptional circumstances in the present case; the appellant could have raised this issue below and merely failed to do so.

[3] The Questions Involved as stated in appellants' brief before the U. S. Court of Appeals were as follows:

> "1. Where defendants' motion to dismiss are sustained by the lower court judge and plaintiffs' entire complaint is dismissed on the grounds that a federal court of equity will not interfere to prevent State authorities from using evidence obtained in an unlawful search in a pending criminal prosecution and that there was no reason to assume that the court of Pennsylvania will not do justice nor apply the proper standards in the interpretation of their 'Obscenity Statute' and where the plaintiffs asked for relief in addition to that, was such a dismissal proper?
>
> "2. Should a motion to dismiss on the grounds that a municipality is not subject to suit under the 'Civil Rights Statutes' be sustained?"

The second question, and the one decided by the court below, involves the discretion of the Federal Courts when confronted by a case in which it is alleged that state action denies rights guaranteed by the United States Constitution. The Court of Appeals stated the question as follows (22a):

> "Decisive of this appeal is the question whether the district court in the exercise of its discretion was correct in refusing to use its equitable power."

The Court of Appeals, citing and relying on an opinion of this Court continued (23a):

> "The decision of the state courts may result in plaintiffs' obtaining the objectives they now seek. If not, petition to the Supreme Court of the United States for writ of certiorari remains. As Mr. Chief Justice Stone for the Supreme Court in Douglas v. City of Jeannette, 319 U. S. 157, 163 (1943), stated:
>
> > 'Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds.'
>
> "Danger of irreparable injury both 'clear and imminent' has not been shown."

The appellants have basically misconceived the nature of this case and the action of the courts below. They fail to recognize that the Federal Courts have discretionary power to determine whether or not it is appropriate for them to intervene, where a charge is made that a person's constitutional rights are violated by state officials. Appellants state in their petition (p. 7):

> "The Court of Appeals affirmed the District Court's action on the grounds, among others, that it *could* not interfere with the State Court's function of determining obscenity." (Emphasis supplied.)

This is a misstatement of the legal position taken by the Court of Appeals. Nowhere in its opinion does it question the *right* of the Federal Courts to intervene where a claim is made of violation of Constitutional rights; its sole discussion deals with the *propriety* of exercising such a right. The question considered by both courts below was thus not whether they "could" interfere in the State administration of its statutes, but whether it "should". Moreover, nowhere is it conceded that it is "the State Court's function of determining obscenity." It is clearly recognized that this is ultimately a Federal question under the First Amendment of the United States Constitution.

The appellants urge two alleged reasons why this Court should grant a writ of certiorari: (1) that the judgment below conflicts with decisions of this Court (p. 7), and (2) that the question involved is of far-reaching importance in the administration of the Pennsylvania and other similar statutes and in the protection of the Constitutional guarantee against suppression of freedom of speech and the press (p. 11).

Neither of the two principal cases cited by the appellants is controlling. The present case deals with the propriety of the exercise of Federal equitable jurisdiction. The recent case of *A Quantity of Copies of Books et al. v. Kansas*,

—— U. S. —— 12 L. ed. 2d 809, decided June 22, 1964, is a case which reached this Court from the Supreme Court of Kansas. Similarly *Marcus et al. v. Search Warrant of Property*, 367 U. S. 717 (1961), came to this Court from the Supreme Court of Missouri. In both cases the merits of the administrative and judicial procedures used in the respective states to enforce their obscenity laws were squarely before this Court after having been passed upon by the highest courts of the States. By contrast, in the present case a complaint was filed in the United States District Court and ultimately argued before the Court of Appeals before any Pennsylvania Court had considered the matter.

The appellants also cite in a footnote (p. 10) three other decisions of this Court, each of which is clearly distinguishable from the present case and none of which would suggest a different result in the present case from that reached by the courts below herein.

Monroe v. Pape, 365 U. S. 167 (1961), involves a suit for damages under the Federal Civil Rights Act. This Court held that the individual officials, but not the municipality of Chicago by which they were employed, could be liable. This Court held that relief in the Federal Court was proper even though a State remedy existed. It did not, however, hold that the Federal Courts were obliged to take jurisdiction.

McNeese v. Board of Education, 373 U. S. 668 (1963), was an action in an Illinois United States District Court in which it was alleged that racial discrimination in the public schools existed and praying for certain equitable relief. The defense was that the plaintiffs had not exhausted their administrative remedies with the State Superintendent of Public Instruction. Here again this Court held that the Federal Courts could grant relief despite the existence of a State remedy. In discussion of the question of the propriety of the exercise of jurisdiction by the Federal Courts, this Court stated (p. 673):

> "Where strands of local law are woven into the case that is before the federal court, we have directed a District Court to refrain temporarily from exercising its jurisdiction until a suit could be brought in the state court. See Railroad Com. v. Pullman Co., 312 U. S. 496, 85 L. ed. 971, 61 S. Ct. 643; Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 84 L. ed. 876, 60 S. Ct. 628; Harrison v. NAACP, 360 U. S. 167, 3 L. ed. 2d 1152, 79 S. Ct. 1025. Thus we have stayed the hands of a Federal District Court when it sought to enjoin enforcement of a state administrative order enforcing state law, since any federal question could be reviewed when the case came here through the hierarchy of state courts. Burford v. Sun Oil Co., 319 U. S. 315, 87 L. ed. 1424, 63 S. Ct. 1098. The variations on the theme have been numerous."

It held that there was no "underlying issue of state law controlling this litigation" and that the district court below should have entertained jurisdiction. In the present case, the underlying issue of State law is obvious—the Pennsylvania Obscenity Statute.

Cantwell v. Connecticut, 310 U. S. 296 (1940), is a case which reached this Court from the Supreme Court of Connecticut. It reversed the conviction of a member of the religious group known as Jehovah's Witnesses for a violation of a statute requiring persons making religious solicitations to obtain a certificate from the local authorities. No question of the propriety of the exercise of jurisdiction is involved in this case.

The only two cases to which the appellants refer which dealt with the question involved in this case are *Grove Press, Inc. v. Calissi*, 208 F. Supp. 580 (N. J. 1962), and *Toth v. Gilbert*, 184 F. Supp. 163 (N. D., Ohio 1960). In both of these cases efforts were made to obtain Federal injunctions against interference with the publication and distribution of material claimed to be obscene by local authorities. In

both cases the Federal Courts refused to intervene relying on this Court's decision in *Douglas v. Jeannette*, 319 U. S. 157 (1943). It is submitted that, contrary to the appellants' assertion that these cases do not deal with the question here involved, in fact they are the only cases cited which do deal with it and they support the position of the appellees and the courts below.

The second reason why the appellants urge this Court to grant a writ of certiorari is its "far-reaching importance" in the administration of state obscenity statutes. This argument appears to be predicated on the assumption that the State Courts of Pennsylvania will not properly interpret and enforce the law as laid down by this Court. It is submitted by the appellees that such is not the case and that the courts below wisely refused so to conclude. It is well known that in certain states there is determined local opposition to the enforcement of certain provisions of the United States Constitution and Federal Statutes. In such cases Federal enforcement is required if the Federal law is to be enforced. Such is not the case in Pennsylvania, however. Indeed the fact that, since this action commenced, the individual plaintiff has been acquitted, by way of directed verdict, of violating the Pennsylvania Obscenity Act and most of his magazines returned to him is evidence that the State Courts can and will heed the decisions of this Court.[4]

If the position of the appellants were accepted, it would mean that every issue of every publication involving photographs of nude persons or text which might be regarded by some as obscene could become a case in the Federal Courts. The Federal Court would be defenseless to determine what matter they should and what they should not consider. The

[4] It is noteworthy that in a case which is a companion to the present case and arose from the same seizure as complained of in the present case, *Dale Book Co., Inc. v. Leary et al.*, decided on August 12, 1964 and referred to in footnote 7 of the petition for writ of certiorari herein, the U. S. District Court found the publications involved obscene.

appellants' position would place an enormous, if not impossible, burden on the Federal Courts. Indeed, the proposition they argue would apply not only to obscenity cases but all the wide variety of cases in which an individual might charge a violation of his rights under the United States Constitution or Federal law.

It is not the position of the appellees that close questions may not arise under the Pennsylvania Obscenity Statute or that the State authorities should manifest indifference to the right of free expression guaranteed by the First Amendment of the United States Constitution. However, it is their contention, concurred in by the courts below, that the Pennsylvania authorities can and will conscientiously and efficiently enforce these rights and that only after the Supreme Court of Pennsylvania has spoken and in dubious cases should a party be heard by this Court.

CONCLUSION

Wherefore, the appellees urge that Your Honorable Court deny a writ of certiorari in this case.

Respectfully submitted,

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